

Cabin Creek and International Law--An Overview

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CABIN CREEK AND INTERNATIONAL LAW—AN OVERVIEW

David K.W. Wilson, Jr.

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I. INTRODUCTION

Six miles north of the Montana border in southeastern British Columbia, Cabin Creek enters the North Fork of the Flathead River. The junction of these two streams is remote and largely inaccessible. South from Cabin Creek across the international border the North Fork follows the western boundary of Glacier National Park before joining the Middle and South Forks. This is one of the wildest areas remaining in the lower forty-eight states. The mountain ranges and valley bottoms provide habitat for moose, elk, bighorn sheep, black and grizzly bears, and wolves.¹ Further downstream is Flathead Lake, the largest freshwater lake west of the Mississippi. The Flathead region is nationally known for its scenery, hunting, fishing, and recreation.

Near where Cabin Creek enters the North Fork are two small hills under which lie an estimated 150 million tons of coal.² Sage Creek Ltd. plans to transform these hills into twin, mile- wide open pit coal mines.³ The company's plans have created enormous concern among Flathead Valley residents, state officials, and federal authorities, who believe that the region's environmental quality will be threatened by the coal mine. Fears are that silt and pollution will flow downstream from the mine into the

1. ENVIRONMENTAL PROTECTION AGENCY, FINAL REPORT OF THE STEERING COMMITTEE FOR THE FLATHEAD RIVER BASIN ENVIRONMENTAL IMPACT STUDY (June 30, 1983) (hereinafter cited as FRBEIS FINAL REPORT) 39.

2. *Id.* at 10.

3. *Id.*

Flathead Basin; that wildlife, especially the Dolly Varden trout, grizzly bear, and wolf, will be endangered; and that water, air, and noise pollution from the mine will adversely affect Glacier National Park, an International Biosphere Reserve.⁴

The greatest concern, though, is that the proposed mines will be in British Columbia, beyond the reach of the environmental laws of the United States. For that reason, the Cabin Creek controversy is not simply a regional drainage basin problem with its resolution dependent on local decisions made in Helena, but rather an international problem whose resolution may also depend on decisions in Victoria, Ottawa, and Washington. Any chance of preventing the construction of the mine or of mitigating its possible adverse effects lies at the very least in direct discussion between Montana and British Columbia, and more probably in international law of pollution control.

Cabin Creek is not an isolated example of pollution along the United States-Canadian border. There is a good reason for this. While the population of much of the northern United States is small, 80% of the Canadian population resides close to the border.⁵ At Cabin Creek, Canadian development threatens an area in the United States renowned for its remoteness and wilderness values. Similar situations occur further east: north of the Boundary Waters Canoe Area in Minnesota, construction of a Canadian power plant is under consideration; and a Canadian dam threatens wetlands along Lake Champlain in New York and Vermont.⁶ Closer to Cabin Creek, a power plant in Saskatchewan may harm agricultural and irrigation values in eastern Montana.⁷

The situation is not that simple, of course. Transboundary pollution is a double-edged sword. In many places American pollution or water development projects impinge on Canadian wilderness and recreation areas. The issue of acid rain from industries in the United States damaging vast areas of the Canadian interior has created much bitterness in Canada, and threatens the close diplomatic ties between the two countries.⁸

However, unlike most nations sharing boundaries, Canada and the United States have at least one mechanism available for resolving

4. *Hearing Before the Subcomm. on Toxic Substances and Environmental Oversight of the Senate Comm. on Environment and Public Works*, 98th Cong., 1st Sess. 181 (July 6, 1983) (hereinafter cited as *Subcommittee Hearing*) (statement of Jon Heberling, Attorney for Flathead Coalition).

5. J. CARROLL, *ENVIRONMENTAL DIPLOMACY: AN EXAMINATION AND A PERSPECTIVE OF CANADIAN-U.S. TRANSBOUNDARY ENVIRONMENTAL RELATIONS*, XVII (1983).

6. *Id.* at 18, 105.

7. International Joint Commission, *The International Poplar River Water Quality Study*, Main Report (1979) 1.

8. CARROLL, *supra* note 6, at 270.

transboundary pollution disputes. In 1909, the two nations signed the Boundary Waters Treaty which created the International Joint Commission (IJC), to resolve boundary water disputes, including those involving pollution.⁹

The purpose of this Comment is to examine the Cabin Creek dispute from both a regional and an international perspective. The history of the mine proposal and institutional responses to date will first be discussed. Then the work of the International Joint Commission will be evaluated to determine if a resolution to the controversy can be found in international law. Because so much concern has been expressed before the beginning of construction, the situation provides a unique opportunity for state, provincial, and national governments to implement an effective means of resolving not only this dispute, but also a growing number of similar disputes along the border. For these reasons, the environmental and legal issues of Cabin Creek deserve close attention. This is more so the case because British Columbia approved Sage Creek Ltd.'s Stage II application to build the mine on February 22, 1984.¹⁰ The company now needs only to gain provincial approval for its operating licenses before construction of the mine can begin.

II. THE DEVELOPMENT OF THE ISSUE

The Flathead Basin consists of 7096 square miles of land, six percent of it in Canada, much of it publicly owned.¹¹ It is an area rich in natural resources. The North Fork Valley, although still relatively wild, is becoming a center of resource development. Recently, oil and gas exploration has skyrocketed,¹² and timber harvesting, long the area's primary industry, has increased.¹³ The North Fork region also contains coal. The existence of coal in the upper North Fork Valley has been known since 1910, but not until the 1960's were any attempts made to extract it.¹⁴ In 1968, Rio Algom Ltd., a division of Britain's Rio Tinto Zinc, entered into a joint venture with Pan Ocean Oil Ltd. of Calgary, to explore the feasibility of coal development in southeastern British Columbia.¹⁵ After securing a license from British Columbia, and obtaining 51 leases covering 24,652

9. The Boundary Waters Treaty, Jan. 11, 1909, United States-Great Britain, 36 Stat. 2448, T.S. No. 548.

10. Schwennesen, Cabin Creek Mine Gets Key Approval, *Missoulian*, Feb. 23, 1984, at 11, col. 1.

11. R. Stevers, *The Flathead Issue in U.S.-Canada Environmental Relations: Institutional Responses in Montana*, (1981) 12 (unpublished Masters Thesis, University of New Hampshire).

12. FRBEIS FINAL REPORT, *supra* note 1, at 37.

13. *Id.* at 37, 39.

14. *Id.* at 11.

15. L. Hocklin, Cabin Creek Realities, Montana Public Affairs, Rep. No. 22, June 1977, 1, 2.

acres,¹⁶ the corporation, Sage Creek, spent seven years exploring, eventually concentrating its efforts at the junction of Cabin Creek and the North Fork.¹⁷

The public first learned of the proposal to mine the coal in 1974.¹⁸ Concern quickly developed among Flathead Valley residents over the effects that the mine would have on their region. In late 1974, several Flathead Valley organizations formed the Flathead Coalition.¹⁹ The Coalition sought to make the public aware of the mine, and pressed for a study of its effects.²⁰ Soon, the State of Montana and members of Montana's congressional delegation became involved. Early attempts by Representative, (now Senator), Max Baucus to bring the matter before the IJC through the State Department met with resistance because the Department did not believe the company's proposal had developed to the point where the United States could raise specific objections.²¹ At the same time, the Montana State Legislature directed the Department of Natural Resources and Conservation to review water resource information from the Flathead system and assess the consequences of a mine upon the area.²² Lack of scientific data sufficient to make any meaningful projection of the mine's effects hampered this review.²³

The desire for more natural resource data and the concerns about the coal mine led to a call for an overall assessment of resource development, present and proposed, in the Flathead Basin.²⁴ Urged on by the Flathead Coalition and the North Fork Interagency Technical Committee, Representative Baucus successfully lobbied Congress in 1977 to appropriate 2.9 million dollars for an overview environmental impact statement of the Flathead Basin.²⁵ The Flathead River Basin Environmental Impact Study, (FRBEIS), a five-year interdisciplinary study of the Flathead sponsored by the Environmental Protection Agency, was the first regional environmental impact statement to examine all development proposals within a drainage basin at one time.²⁶ Its creation was largely a response to the

16. Stevers, *supra* note 11, at 12.

17. Hocklin, *supra* note 15, at 2. The coal at Cabin Creek is purported to be seven times as valuable per ton as coal from the northern plains.

18. Burke, Coal Mine Poses Threat to Flathead Valley, *Missoulian*, Feb. 12, 1974, at 1, col. 2.

19. *Subcommittee Hearings*, *supra* note 4, at 178 (statement of Jon Heberling). Organizations represented included the Sierra Club, The Montana Wilderness Assoc., the Lions Club, the League of Women Voters, and local Chambers of Commerce.

20. *Id.* at 178 (statement of Jon Heberling).

21. Hocklin, *supra* note 15, at 3.

22. FRBEIS FINAL REPORT, *supra* note 1, at 11.

23. *Id.*

24. *Id.*

25. *Id.* at 12.

26. *Id.*

perceived threats to the region posed by Sage Creek's plans.

Implicit in the concept of this study was the feeling that if the United States showed concern for development proposals on its side of the border, concerns in the Flathead over possible pollution originating in British Columbia would have more credibility. As the study would show, though Cabin Creek was the gravest threat, oil and gas leasing, hydroelectric generation, timber harvesting, and increased population also posed threats to the Flathead.²⁷ Obviously, developments such as these in Montana would weaken the United States' request that British Columbia reject the mine proposal.²⁸

Meanwhile, Sage Creek was attempting to comply with British Columbia's environmental regulations in order to begin construction of the mine. In Canada, the provinces, which are much more independent from the national government than the states in the United States, have almost exclusive control over the development of resources on public land.²⁹ In British Columbia, coal development is controlled by guidelines established by the Environment and Land Use Committee of the British Columbia Cabinet.³⁰ The aim of the guidelines is to ensure that a "rational approach to managing land use, environmental, and community impacts is undertaken prior to final decisions on coal and related development."³¹ The guidelines include a five step project assessment process coordinated by a Coal Steering Committee.³² The first step, the Prospectus, entails a general description of the proposed development by the developer. Stage I is a preliminary impact assessment which must be approved by appropriate provincial departments. Stage II is the most crucial, involving a detailed assessment of the project, the British Columbia equivalent of an environmental impact statement. In Stage III, the project is given a final analysis and granted licenses if accepted. Stage IV is the formal implementation of the project.³³

27. Stevers, *supra* note 11, at 3, 4.

28. For the same reason, Rep. Baucus pressed for the inclusion of the three forks of the Flathead in the Wild and Scenic River System. Additional efforts in Montana at this time included the passage of a state law allowing Montanans to sue Canadian polluters in Montana. Mont. Rev. Codes Ann. §§ 69-3906(4), -4802(10) (1977). See Arbitlit, *The Plight of American Citizens Injured by Transboundary River Pollution*, 8 *ECOLOGY L.Q.* 339 (1979). Arbitlit discusses three possible remedies for United States' citizens affected by Canadian pollution from Cabin Creek: by direct use of the courts of the two nations; through provisions of the Boundary Water Treaty; and through use of the Foreign Sovereign Immunities Act. Of the three, the last provides the best possibility for collecting damages.

29. Hocklin, *supra* note 15, at 8.

30. Environment and Land Use Committee, British Columbia, *Guidelines for Coal Development* (1976).

31. *Id.* at 1.

32. *Id.* at 2.

33. *Id.* at 9.

In July of 1975, Sage Creek submitted its Prospectus.³⁴ The Stage I application was presented in July 1976, and approved that October.³⁵ The Stage II Assessment, completed in late 1979, was rejected in early 1980.³⁶ One reason given for the rejection was that the assessment had not adequately addressed the company's plans to reroute a small stream around the northernmost hill of the project in order to accommodate a waste dump.³⁷ British Columbia officials were concerned with the effect that such a diversion would have downstream. This concern had been previously expressed to the British Columbia government by Montana officials.³⁸

After the initial Stage II application was rejected, the threat of imminent development of the mine abated. Sage Creek seemed in no rush to submit a new Stage II application. The market for coal was, and remains, soft.³⁹ Nonetheless, the prospect of a mine at Cabin Creek involves potentially huge revenues for Sage Creek as well as British Columbia. Thus, it was no surprise that Sage Creek re-submitted a revised Stage II application. The Coal Guidelines Steering Committee accepted this application for review in February of 1982.⁴⁰

Sage Creek's current proposal involves two open pit mines, each 1000 feet deep, to be dug directly north and south of Cabin Creek near its confluence with the North Fork.⁴¹ A total of eight square miles of land will be disturbed by the mines and the proposed waste dumps to be built adjacent to the mines along Cabin Creek and Howell Creek.⁴² Other developments at the mine site will include tailing ponds, run-off ponds, a processing plant, a coal drier, and a temporary townsite.⁴³

Because British Columbia recognized Montana's continued concern over the mine, it invited the state to submit official comments on the second Stage II application. These comments, included in the official provincial review, represent the first time that Montana has been given an opportunity to comment on a major Canadian development.⁴⁴ Working with a

34. Stevers, *supra* note 11, at 23.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 29.

39. *Subcommittee Hearings, supra* note 4, at 181 (statement of Jon Heberling).

40. Schwennesen, Cabin Creek Coal Mine Bid Hits Second Level, *Missoulian*, Feb. 18, 1982, at 7, col. 4.

41. FRBEIS FINAL REPORT, *supra* note 1, at 165.

42. *Id.*

43. *Id.* Originally, the company proposed a permanent community of one thousand workers at the mine site, but that idea was eliminated in 1982.

44. Letter from Montana Governor Ted Schwinden to British Columbia Premier, William Bennett (May 13, 1982).

short deadline and drawing primarily from data gathered during four years of research by the Flathead River Basin Study Commission, state officials submitted a one-hundred page report highly critical of the mine proposal (Montana Comments).⁴⁵

Using state and federal environmental regulations for coal mines as guidelines, the Montana Comments addressed five major concerns about potential environmental harm to the Flathead Basin. First, emissions of particulate matter from the coal drier at the site would exceed both state and federal air quality standards.⁴⁶ Additionally, the state estimated that about eight trucks an hour would use the haul road to Fernie, causing dust that would increase air pollution and reduce visibility in Glacier National Park.⁴⁷

Second, the Montana Comments reflected concerns about the effect the mine would have upon water resources and aquatic ecology, including possible impacts upon Flathead Lake.⁴⁸ Connected with this concern with water quality, state officials predicted that the mine would have an adverse effect on fisheries, the third major area of harm. Fishing is a mainstay of the tourist industry in the Flathead Valley,⁴⁹ and the proposed mine will harm one of the major spawning grounds for the Dolly Varden, the most prized of the native fish.⁵⁰

The mine also threatens the continued livelihood of remnant wolf and grizzly populations. Both of these animals are protected in the United States under the Endangered Species Act.⁵¹ The grizzly population just south of the boundary near the mine site is the most concentrated in the lower forty-eight, and the bear is generally considered to be a major symbol of the wilderness character of the area. Because both animals are quite common in other parts of British Columbia, the Stage II Assessment did not adequately address the mine's impact on their populations in that area.⁵² Montana officials expressed fear that operation of the mine would lead to the biological "insularization" of Glacier Park, threatening its role as a World Biosphere Reserve.⁵³

Finally, the Montana Comments were critical of the company's failure to include an adequate reclamation plan. The one in the assessment

45. State of Montana Comments on Sage Creek Coal Company's Stage II Assessment (May 13, 1982) (hereinafter cited as Montana Comments).

46. *Id.* at III.

47. *Id.* at V-3.

48. *Id.* at II-0.

49. FRBEIS FINAL REPORT, *supra* note 1, at 47, 135.

50. Montana Comments, *supra* note 47, at vi.

51. Endangered Species Act, 16 U.S.C. §§ 1531-1543 (1974).

52. Montana Comments, *supra* note 47, at viii.

53. *Id.* at V-4.

was considered "unspecific and extremely poor" by Montana standards.⁵⁴

Brian Smith of the Ministry of Energy, Mines and Petroleum Resources responded to the Montana Comments on September 27, 1982, in a letter to Montana Governor Schwinden.⁵⁵ Smith acknowledged that Montana did raise some issues not addressed in the company's assessment, but explained that many of those concerns would be addressed in the Stage III Assessment at which time specific requirements of the British Columbia environmental regulatory agencies would have to be met.⁵⁶

The Stage II application has been accepted by British Columbia. Sage Creek now has five years to secure operating licenses in the Stage III process and to find buyers for the coal.⁵⁷ Due to the pressure from Montana and the State Department though, British Columbia took the unusual step of conditioning its approval of the mine.⁵⁸ The conditions are a response to Montana's concerns and include requirements that Sage Creek complete in-depth studies of the fisheries and wildlife of the area.⁵⁹ Additionally, Provincial approval was made conditional on actions taken by the Canadian Government pursuant to Boundary Waters Treaty obligations.⁶⁰

Nevertheless, Senator Baucus, contending that modifications to the project's design are necessary to protect Montana's water quality,⁶¹ asked the State Department to refer the matter to the International Joint Commission.⁶² He requested that a two-year study be undertaken which will presumably be completed before coal markets improve and construction begins.⁶³ The Canadian government has previously indicated that it will join with the United States in making a referral to the IJC.⁶⁴

III. THE INTERNATIONAL JOINT COMMISSION AND CABIN CREEK

A. *The Purpose and Powers of the IJC*

Because it is now probable that any joint solution to the Cabin Creek conflict will be reached under the terms of the Boundary Waters Treaty,

54. *Id.* at VI-1.

55. Letter from British Columbia Minister of Energy, Mines, and Petroleum Reserves, Brian Smith, to Montana Governor Ted Schwinden, accompanying the British Columbia Response to the Montana Comments (Sept. 27, 1982).

56. *Id.*

57. *Supra* note 10.

58. *Id.*

59. Letter from Anthony Brummett, Chairman, British Columbia Environment and Land Use Committee, to L.H. Hunter, President of Sage Creek Coal, Ltd. (Feb. 22, 1984).

60. *Id.*

61. Missoulain, *supra* note 10.

62. Telephone interview with Ron Cooper, Aide to Senator Max Baucus (Feb. 21, 1984).

63. *Id.*

64. *Id.*

the remainder of this Comment will focus on the treaty and the IJC and their effectiveness in resolving pollution disputes.

Great Britain and the United States negotiated the Boundary Waters Treaty in 1909 to resolve water disputes along the boundary between Canada and the United States.⁶⁵ It was designed to remedy any trans-boundary water dispute, although most of the initiative behind the treaty was to regulate uses of water that required "bilateral action."⁶⁶ Examples of early issues addressed were the establishment of the Saint Lawrence Seaway, irrigation disputes, and hydroelectric projects involving both governments.⁶⁷

The treaty created the International Joint Commission which has six members, three from each nation, appointed by the President and Prime Minister.⁶⁸ It is a quasi-judicial body which has mandatory jurisdiction to approve or disapprove projects such as diversions or obstructions affecting boundary waters.⁶⁹ In this area, Commission decisions are binding on both nations. But, the Commission also is given broad authority to investigate other matters referred to it.⁷⁰ When disputes arise, either or both nations may make a "reference" to the Commission, requesting an investigation. In practice, references have always been made by agreement of both.⁷¹ The investigative findings are usually put together into a recommendation outlining what action should be taken to alleviate the boundary dispute. These recommendations are non binding and have been adhered to in varying degrees, as will be examined below.⁷²

Article IV of the Boundary Waters Treaty specifically deals with pollution: "It is further agreed that the waters herein defined as boundary waters and waters flowing across the boundary shall not be polluted on either side to the injury of health or property on the other."⁷³

This provision is very unusual considering the date of the treaty, 1909—fifty years before pollution became a major issue. However, the fact that neither "pollution" nor "injury" was defined in the treaty has left the meaning of Article IV in question.⁷⁴

Additionally, the effectiveness of the treaty was further weakened by

65. Boundary Waters Treaty, *supra* note 9.

66. CARROLL, *supra* note 5, at 40.

67. *Id.* at 47.

68. Boundary Waters Treaty, *supra* note 9, Art. VIII, at 2451.

69. CARROLL, *supra* note 5, at 47.

70. *Id.*

71. FRBEIS FINAL REPORT, *supra* note 1, at 40.

72. CARROLL, *supra* note 5, at 47.

73. Boundary Waters Treaty, *supra* note 9, Art. IV, at 2450.

74. Bilder, *Controlling Great Lakes Pollution: A Study in U.S.-Canadian Environmental Cooperation*, 70 MICH. L. REV. 469, 515 (1972).

the inclusion of the Harmon Doctrine in Article II.⁷⁵ That doctrine was formulated in 1895 by Attorney General Judson Harmon to deal with apportionment of waters flowing out of the United States into Mexico. It states that nations have exclusive jurisdiction and control over the uses of all waters within their boundaries.⁷⁶ The strongly nationalistic terms of the doctrine are only slightly tempered by subsequent language in Article II stating that a downstream user injured by an upstream user is entitled to the same rights and remedies that he would have if the injury had occurred in the source nation.⁷⁷ Realistically, this "right" to legal recourse in the source nation is almost completely hampered by the difficulty of filing suit and enforcing damages in a foreign country.⁷⁸

Despite the uncertainty about the meaning of certain sections of the treaty and the amount of power it vests in the IJC, it has through the years been an effective mechanism in resolving transboundary pollution disputes. The second reference to the newly formed IJC concerned the "extent, causes, and locality" of boundary water pollution.⁷⁹ Other early references involved specific pollution controversies, and most of the recent referrals to the Commission have also involved pollution. Examination of the work of the IJC in recent years sheds light on how the Cabin Creek reference might be treated.

B. Case Studies

1. Garrison Diversion

The most famous—and infamous—recent transboundary water quality issue is the proposed Garrison Diversion Unit (GDU), along the North Dakota-Manitoba border. The GDU is a proposal to divert water from the Missouri River to irrigate 250,000 acres of North Dakota land, and to provide municipal, industrial, and recreational water supplies.⁸⁰ Much of the water diverted would flow, once used, into the Hudson Bay drainage in Manitoba. Manitobans feared that the mixing of waters from the Missouri with those draining north would have an adverse impact in Canada.⁸¹ In 1975, the two governments referred the matter of the transboundary

75. Boundary Waters Treaty, *supra* note 9, Art. II, at 2449.

76. CARROLL, *supra* note 5, at 43.

77. Boundary Waters Treaty, *supra* note 9, Art. II, at 2449.

78. See generally, Arbitlit, *supra* note 30.

79. Bourne, *International Law and Pollution of International Rivers and Lakes*, 6 UNIV. B.C.L. REV. 115, 133 (1971).

80. International Joint Commission, *Transboundary Implications of the Garrison Diversion* (1977) 1.

81. Kaufman, U.S. & Canada Agree to Study Dam Project, *New York Times*, Nov. 28, 1983, at A12, col. 1.

implications of the Garrison project to the IJC.⁸²

In 1977, the IJC issued a strongly worded report recommending that no portions of the GDU affecting Canadian waters be built until certain conditions were met.⁸³ The Commission implied that if the United States did not meet the conditions the Boundary Waters Treaty would be violated. Although clearly following the Treaty in recommending against pollution from a transboundary project, the strong stance taken by the IJC has led to disputes among diplomats, who believe it has exceeded its mandate. There are fears that its scope of investigation may, as a consequence, be limited in future matters.⁸⁴

The politically controversial Garrison project is presently moving ahead, but only on a limited basis. Its proponents claim that the first phase will not affect the Canadian river systems, and is consistent with the IJC recommendations.⁸⁵ But, both the Canadian government and concerned groups in the United States fear that, although the project is limited now, there is still a good chance of biota transfer from one drainage causing pollution in another.⁸⁶ In late 1983, Canada and the United States established a commission, made up of representatives of both national governments, North Dakota and Manitoba to study Canadian concerns.⁸⁷ This commission is independent of the IJC, which has not been involved in the dispute since 1977, but its purpose seems to reflect the earlier IJC recommendations.

The IJC's Garrison recommendations set a precedent against development projects producing extensive pollution across the border. The fact that such a recommendation was made could in itself have a positive effect upon a Cabin Creek reference. If these recommendations are adhered to, the United States' position in any Cabin Creek negotiations would be further strengthened.

2. *Poplar River*

A less encouraging result was reached in 1979 when the IJC issued its findings on the Poplar River controversy.⁸⁸ That dispute grew out of Saskatchewan Power Corporation's 1973 proposal to build a 600 megawatt coal-fired generating plant near Cornach, Saskatchewan, north of

82. Transboundary Implications of the Garrison Diversion, *supra* note 82, at 1.

83. *Id.* at 4.

84. CARROLL, *supra* note 5, at 128.

85. Telephone interview with Ed Brigham, National Audobon Society, Minneapolis (Feb. 17, 1984).

86. *Id.*

87. *Supra* note 81.

88. International Joint Commission, International Poplar River Water Quality Study, Main Report (1979) (hereinafter cited as IPRWQS Main Report).

Poplar, Montana.⁸⁹ The pollutants from the plant would flow downstream into Montana.⁹⁰

Two references were made to the IJC, one on water quality, the other on water apportionment.⁹¹ The major point to come out of the Water Quality Study's Main Report was the implication that some downstream pollution is acceptable across the international border.⁹² This finding, reflecting the Harmon Doctrine, seems at odds with the recommendations made in the Garrison Diversion reference, and may reflect the reaction to the strong wording of that finding. Another disturbing element in the Poplar River dispute is the fact that the power plant was in operation and discharging pollutants for half a year before the final IJC Report was issued.⁹³ Both of these factors could reduce the effectiveness that an IJC reference would ultimately have on Cabin Creek.

Despite these problems, the IJC work on the Poplar River dispute did have a positive result. A Bilateral Poplar River Monitoring Commission set up by the IJC continually monitors air and water quality and water apportionment, and exchanges data between the two nations. The commission is composed of members from state, provincial, and federal governments.⁹⁴ The creation of ongoing commissions to follow up on IJC recommendations and to monitor pollution has been used in the past in other referenced matters, and has given the IJC long term, indirect influence over border controversies.

3. *High Ross Dam*

Another recent IJC decision on a boundary waters matter, the High Ross Dam controversy, demonstrates the effectiveness of ongoing study, and may well set an example for Cabin Creek.⁹⁵ High Ross does not directly concern pollution. Instead, it involves flooding into British Columbia caused by the Ross Dam in Washington.⁹⁶ However, it is similar to Cabin Creek because the flooding of the Skagit River has affected a remote wilderness area in British Columbia known for its recreational values.⁹⁷

89. *Id.* at vii. See also CARROLL, *supra* note 5, at 184.

90. CARROLL, *supra* note 5, at 174.

91. *Id.* at 184.

92. IPRWQS Main Report, *supra* note 90, at 115.

93. CARROLL, *supra* note 5, at 193.

94. *Id.*

95. International Joint Commission, Supplementary Order, In the Matter of the Application of the City of Seattle for Authority to Raise the Water Level of the Skagit River Approximately 130 feet at the International Boundary Between the United States and Canada (April 28, 1982) (hereinafter cited as Supplementary Order).

96. CARROLL, *supra* note 5, at 96.

97. Parker, *High Ross Dam: The IJC Takes a Hard Look at the Environmental Consequences of Hydroelectric Generation—The 1982 Supplementary Order*, 58 WASH. L. REV. 445, 446 (1983).

In 1927, Seattle City Light (Seattle) began constructing a series of hydroelectric dams.⁹⁸ This project culminated in Ross Dam, creating Ross Lake, Seattle's primary storage facility for hydropower.⁹⁹ In 1941, Seattle requested a permit from the IJC to raise the level of Ross Dam, an action that would have flooded 6300 acres of Canadian land.¹⁰⁰ Under Article VIII of the Treaty, the IJC was given mandatory jurisdiction over all cases of obstruction and diversion of boundary waters.¹⁰¹ This article also gives the IJC power to request indemnification of damaged parties. In 1947, the IJC granted Seattle's request on the condition that the province and the city reach a binding agreement on indemnification.¹⁰² Since then the dam has been raised a number of times, although never to the level requested in 1941. The city and the province have been at constant odds over the method of indemnification.¹⁰³ In 1980 British Columbia, reacting to Seattle's continued interest in raising the level of the dam, put the matter before the IJC for resolution.¹⁰⁴

In April of 1982, the IJC issued a Supplementary Order.¹⁰⁵ Although the Commission rejected British Columbia's specific requests, it found that under "the Commission's responsibility to prevent disputes . . . the Canadian Skagit should not be flooded beyond its current level."¹⁰⁶ However, the Commission required British Columbia to compensate Seattle "in the form of money, energy, or any other means," for the loss of the hydroelectric resource.¹⁰⁷ After ordering Seattle to maintain the level of the dam for one year, the Commission created a Special Board comprised of two IJC members and one each from the United States, Canada, British Columbia, and Seattle, to reach an agreement acceptable to all parties.¹⁰⁸ During the following year, Seattle and British Columbia signed a "Framework Agreement" implementing the IJC's recommendation not to raise the dam.¹⁰⁹ The Agreement outlined a compensation plan for British Columbia to supply Seattle with the amount of hydropower that Seattle lost in not being able to raise the dam. Seattle will pay British

98. *Id.* Seattle City Light is Seattle's municipal lighting authority.

99. CARROLL, *supra* note 5, at 96.

100. Parker, *supra* note 99, at 451.

101. Boundary Waters Treaty, *supra* note 9, Art. VIII, at 2451.

102. Parker, *supra* note 99, at 451.

103. *Id.* at 452, 453.

104. *Id.*

105. Supplementary Order, *supra* note 97.

106. *Id.* at 2.

107. *Id.*

108. *Id.*

109. Skagit Negotiations, Framework Agreement Between Canada and the United States (Feb. 3, 1983).

Columbia for that power for the next eighty years.¹¹⁰ One important feature of the Framework is the environmental endowment fund created to finance the maintenance of recreational facilities in the Ross Lake/Skagit Valley.¹¹¹ The IJC's work on the Skagit issue is significant for three reasons. First, although organized by the IJC, the final decision was essentially worked out locally between British Columbia and Seattle. This method could be followed at Cabin Creek, especially because the local governments are familiar with the environmental problems and with each other. Second, the IJC Order and Framework Agreement implicitly recognized environmental values in the decision not to raise the level of the dam, and explicitly recognized them in the creation of an environmental endowment fund. Third, the IJC seemed to reject the Harmon Doctrine, which gives each state absolute rights to waters on its side of the border, in favor of a more equitable apportionment.¹¹²

C. *Effect on Cabin Creek of Recent IJC Decisions*

As previously mentioned, Senator Baucus has asked the State Department to draft a request for a two year IJC study of Cabin Creek. What can be accomplished by an IJC Cabin Creek reference will depend upon what the Commission's recommendations are and, more importantly, whether they are adhered to by the two governments. It must be remembered that IJC decisions are not binding in these matters, as has been demonstrated by the continuing controversy over the Garrison Diversion. Recommendations have, however, generally been followed. Recently, one commentator stated that "the evolving body of decisions by the IJC presents a clearly definable principle of international law."¹¹³ Those "definable principles" have expanded with the recent decisions noted above. A strong recommendation against the pollution of Cabin Creek would strengthen the precedent against substantial transboundary pollution.

It is apparent that in almost every controversy where the IJC has stepped in, concessions have been made by both sides. That will certainly

110. *Id.* at 2.

111. *Id.* at 11.

112. Parker, *supra* note 99, at 449. The Harmon Doctrine of unlimited sovereignty has been superceded in international law by the doctrine of equitable utilization. Helsinki Rules on the Uses of Waters of International Rivers, Aug. 20, 1966 (Adopted by the 52nd Conference of the International Law Assoc.) Reprinted in J. BARROS & D. JOHNSTON, *THE INTERNATIONAL LAW OF POLLUTION* (1974) 77. Under the Helsinki Rules, each state is entitled, within its territory, to a reasonable and equitable share in the beneficial use of the waters of an international drainage basin. Helsinki Rules, Article VI.

113. Sugarman, *The IJC and Principles of International Law*, in ABA/CBA COMMON BOUNDARY/COMMON PROBLEMS: THE ENVIRONMENTAL CONSEQUENCES OF ENERGY PRODUCTION 48 (1981).

be the case at Cabin Creek. It is those very concessions that have enabled the IJC to remain a viable referee in boundary disputes at times when the two nations could have been left without any problem resolving body. Furthermore, concessions made as a result of IJC study of a problem are not made with a single drainage, lake, or river in mind.

One reason that the IJC works well . . . [is that there] is not one river; it is a whole series of them, and there is always the knowledge that you had better be generous this time because next time, the shoe may be on the other foot, and you might be downstream instead of upstream.¹¹⁴

Thus, addressing development at Cabin Creek, there is reason to believe that an IJC decision there will be favorable to Montana and the Flathead Valley. Granted, the Poplar River decision allowing some pollution downstream does not bode well for Montana's interest in keeping the Flathead pristine. If the Stage III Assessment is accepted and the plant granted licenses, if coal markets improve, and if construction begins, it is doubtful that the IJC could stop the project and prevent all downstream pollution. On the positive side, though, if the Garrison Project as currently proposed has only a limited effect on Canadian waters, and if the Skagit Framework Agreement is successful, (there is every indication that it will be), it means that there will have been two recent concessions to the Canadians by the United States on river disputes. Significantly, one of those concessions involved British Columbia.¹¹⁵

The Skagit River decision, with its provisions for compensation, was based on the indemnification provision in Article VIII of the treaty.¹¹⁶ Although that provision does not apply to pollution, the creation of an environmental endowment fund in the Skagit Framework Agreement set a precedent that could be read to broaden the meaning of the provision. One of the greatest concerns in the Flathead Valley is whether Sage Creek would be held to compensate for any pollution damage to valley property. Given the probability that the mine will be constructed, it is possible that the IJC, following its work on the Skagit, could request that the two countries initiate a study of property and recreational values in the Flathead, and set up an indemnification program before the mine

114. Henry, *Transboundary Pollution and the IJC*, in ABA/CBA COMMON BOUNDARIES/COMMON PROBLEMS: THE ENVIRONMENTAL CONSEQUENCES OF ENERGY PRODUCTION, 49 (1981).

115. As noted earlier, Canadian provinces are largely independent from the national government on resource matters. For that reason any attempts to link the conflict in British Columbia with other conflicts along the border would probably have little influence on the British Columbia government. It is interesting to note that acid rain has not even been raised by British Columbia as a parallel issue. Telephone interview with Ron Cooper, Aide to Sen. Max Baucus (March 16, 1983). Thus, the existence of a recent concession to British Columbia is particularly important.

116. Boundary Waters Treaty, *supra* note 9, Art. VIII, at 2451.

commences.

Another important aspect of the Skagit Agreement is that the Seattle and British Columbia governments were given the ultimate decision making power. Montana has kept pressure on British Columbia, and the concessions that have been made are the result of that more so than any federal pressure. It would make sense at Cabin Creek, as at Ross Lake, to give the primary decision making to the local governments, leaving the IJC to oversee the process and ensure that the link between Cabin Creek and other transboundary disputes is recognized.

At Cabin Creek the IJC has the opportunity to increase its effectiveness in resolving transboundary pollution disputes. By following and expanding upon past IJC decisions, the Commission can set a strong precedent in determining how much, if any, pollution will be tolerated across the border. Additionally, a strong stand on indemnification of injured parties and a recognition of the necessary role of the local, state, and provincial governments in the fact finding and decisionmaking will reaffirm earlier IJC recommendations. The effect of a comprehensive study at Cabin Creek culminating in a clearly defined recommendation against pollution will be to enhance the credibility of the IJC as a dispute resolving body. A strong line of recommendations, up to and including one at Cabin Creek could eventually result in more pressure being put on the two nations to adhere to IJC findings.

D. *Consideration of a Stronger IJC*

Some have argued that the IJC is not as effective as it could be, and should be given broader power in resolving pollution disputes.¹¹⁷ While the IJC should be able to effectively resolve the Cabin Creek dispute, if it does not, or if British Columbia refuses to follow its findings, then consideration of a stronger mechanism may be in order. The Boundary Water Treaty gave the IJC mandatory jurisdiction over all water diversions along the boundary.¹¹⁸ Emerging trends in international pollution law may provide the basis for an expansion of that mandatory jurisdiction into the area of pollution control.¹¹⁹ With mandatory jurisdiction, the IJC would automatically be called in to investigate possible impacts from any construction along the border. This expansion of the IJC's power would require a special

117. *Subcommittee Hearing*, *supra* note 4, at 174 (statement by James Cumming).

118. *Boundary Waters Treaty*, *supra* note 9, Art. IV, at 2450.

119. Tied to the doctrine of equitable utilization in the Helsinki Rules is the assertion that nations must prevent all water uses producing "substantial injury" to the neighboring state, if such use does not fall within the state's equitable utilization of its water. Helsinki Rules *supra* note 114. Although not officially endorsed by either Canada or the United States, the Helsinki Rules summarize generally accepted principles of international law. See generally *Arbitlit*, *supra* note 30, at 360-67.

agreement between Canada and the United States.¹²⁰

Mandatory jurisdiction could have advantages over the present issue by issue treatment by the IJC. First, it would ensure that environmental impacts would be studied and evaluated before construction begins, avoiding situations like that which occurred at Poplar River. Second, a known set of environmental standards would necessarily be applied whenever a pollution problem arose. Despite these advantages, mandatory jurisdiction would be difficult to initiate and could also create problems. The two nations have been reluctant to alter the terms of the Treaty in the past.¹²¹ Also, mandatory jurisdiction would take the flexibility out of the current dispute resolution process. In situations where the local governments may be able to resolve a problem among themselves, automatic referral to the international body could alienate the parties and make it more difficult to arrive at an equitable solution. Weighing this alternative against the present mechanism it appears more advantageous to both countries, at this point, to leave the IJC structure as it is. Once the IJC has built up some "case law," local and national governments can attempt to adhere to its standards prior to making a reference.

IV. CONCLUSION

The Cabin Creek controversy is a classic example of the problem of transboundary pollution: most of the benefits accrue to one side, while most of the damage goes to the other.¹²² It is probable that the mine will be built—there is too much high grade coal at Cabin Creek to be ignored. The challenge lies in how well Montana, British Columbia, and the two national governments can work together to ensure that if a mine is built, each party's environmental and economic concerns are addressed. To date, the cooperation has been greater than in most previous transboundary disputes. This creates the possibility that the dispute can be resolved through informal channels. There are some Montana officials who prefer that the negotiations be kept informal, in light of the concessions already made by British Columbia.¹²³

But, it is likely that the IJC will play a role in resolving the dispute. The greater challenge lies in whether the two nations will allow the IJC to become a more effective means of resolving not only the Cabin Creek controversy, but all other transboundary pollution disputes. Because Sage Creek has not yet begun construction of the Cabin Creek mine, the IJC will

120. Telephone interview with Frank Bevaqua, IJC (Mar. 16, 1984).

121. *Id.*

122. *Subcommittee Hearing, supra* note 4, at 178 (statement of Jon Heberling).

123. Telephone interview with Mike Pichette, Aide to Montana Governor Ted Schwinden (Feb. 24, 1984).

have an excellent opportunity to complete a thorough study of the impacts of transboundary pollution and to make recommendations which will serve as standards to be followed in resolving future disputes along the boundary. If the IJC fails to adequately resolve the Cabin Creek dispute, then consideration of mechanisms for strengthening the body may be in order.